



AUGUSTINE BAND OF CAHUILLA INDIANS
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Tribal Chairperson: MaryAnn Green

January 27, 2010

Sent by first class mail and electronic -mail to Post 2017BCP@wapa.gov

Mr. Darrick Moe
Manager - Desert Southwest Region
Western Area Power Administration
P.O. Box 6457
Phoenix, AZ 85005-6457

RE: Comments of the Augustine Band of Cahuilla Indians to the Boulder Canyon Project – Post 2017 Application of the Energy Planning and Management Program Power Marketing Initiative Federal Register Notice of November 20, 2009.

Dear Mr. Moe:

The Augustine Band of Cahuilla Indians (“Band”), a federally recognized Native American government, respectfully submits the following comments in response to the Western Area Power Administration’s (“Western”) Federal Register Notice of November 20, 2009 regarding the Boulder Canyon Project.

The Band addresses Western’s expressly noted areas for comment in the same sequence as listed in the Federal Register Notice, as well as its additional comments thereafter.

1. Application of the Power Marketing Initiative to the Boulder Canyon Project

The Band supports the application of the Power Marketing Initiative (“PMI”) to the Boulder Canyon Project. We believe that current legal authority authorizes Western to utilize this protocol, and its application to the Boulder Canyon Project is consistent with Western’s administrative and regulatory powers and Western’s past use of the PMI with regard to other federal power projects since its inception in 1995.

Title 43 U.S. Code Section 617d(b) provides that “the holder of any [Hoover power] contract for electrical energy not in default . . . shall be entitled to a renewal . . . upon such terms and conditions *as may be authorized or required under the then existing laws*

and regulations . . .” [emphasis added]. This language expressly provides for renewal of contracts *subject to* Western’s administrative and regulatory authority.

The PMI is an appropriate regulatory action by the agency in furtherance of its responsibilities to administer, fairly and efficiently, allocations of Hoover power while properly accommodating the rights of renewal of existing contractors. Inherent in Western’s responsibilities regarding this public resource is the requirement that Western periodically, and prior to power purchase contract renewals, undertake a review of resource reallocation as communities and power needs within the Boulder Canyon Project service area change over time.

If Western forgoes the application of the PMI, what approach would Western utilize in allocating the resource as of October 1, 2017? In the absence of the PMI or any new tribal customer allowance, we would consider asserting independent claims to Project power.

2. Quantity of Resources Extended to Existing Customers

The Band believes that Western’s current proposal is too extreme in its protection of currently contracted shares as against the interests of potential new contractors, especially the more than 40 Federally-recognized Native American governments estimated to lie within the Project service area.

In addition, we are not persuaded that the quantities of energy and capacity set out in Western’s proposal meet the equitable redistribution mandate of the PMI. The disparately impacted economic interests of new tribal customers and their members and our current preclusion from direct ability to contract for any Hoover power outweigh the need to almost completely insulate existing customers in a reallocation process.

The application of the PMI can assure the provision of future resource planning stability to existing customers while also accommodating a larger distribution of power to new users. Consistent with applying the PMI, Western can achieve this assurance while only renewing a 90% share of the current allocations otherwise expiring in September 2017.

3. Size of Proposed Resource Pool

The quantity of the resources extended to new tribal customers should equal 10% of the total Project energy and capacity output. Such a total is on par with the share offered new tribal customers in other Western projects involving tribes that had not previously received any allocations. A 10% “tribal pool” is necessary to address proportionately larger economic impacts of current regional economic conditions and the significant number of tribes in the Project service area in comparison to other Western preference customers similarly located. This share is also consistent with Western’s practices in allocating a portion of output from other projects, as was done initially for Pick-Sloan, based at least in part on projected tribal needs.

4. Excess Energy Provisions

New tribal customers should receive an option to purchase any excess energy available during any calendar year in proportion to their share of power or at least on the same proportionate basis as that made available to existing customers.

5. Term of Contracts

The Band supports the creation of at least 30-year contracts in the 2017 reallocation. Such a term is consistent with the historical practice in renewing electrical power contracts for the Boulder Canyon Project, and allows sufficient certainty for existing contractors while enabling timely opportunities for potential new contractors to seek power contracts.

6. Additional Comments

a. Consistent with current U.S. Department of Energy Native American policy, Western must maintain a government-government relationship with federally recognized Native American governments. On this basis the Band supports the Inter Tribal Council of Arizona's rejection of the notion that any new tribal customer in Arizona or Nevada should be required to receive its allocation through the Arizona Power Authority ("APA") or the Colorado River Commission of Nevada ("CRC"), respectively.

Western has not previously required tribes to contract for preference power directly through non-Federal governmental agencies, and while the Band does not desire to limit any tribe wishing to engage itself with one or more of these states or their power distribution entities, it is our position that Western has no authority to require receipt of tribal allocations through the APA or CRC.

Federal Indian law including statutes and court rulings since 1928, the year of the original language governing Hoover, recognizes significant limits on state authority over tribal interests. These actions affirm that only Congress, acting specifically and affirmatively, can limit tribal governmental or regulatory authority. See, *Williams v. Lee*, 358 U.S. 217, 220 (1959); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170, 171, (1973). Even in cases involving state versus tribal authority where Congress seemingly delegated jurisdiction to states using this language, "those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .", the United States Supreme Court has held that such state authority does not apply when it interferes with tribal self-government. See, *Bryan v. Itasca County*, 426 U.S. 373 (1973).

Western's conveyance of hydro-electric power to tribes from other federal public power projects has consistently recognized and supported tribal self-government and direct federal/tribal interaction on a government-to-government basis. Tribal receipt of hydro-electric power from Hoover must be accomplished in the same manner.

The Boulder Canyon Project Act of 1928, and the amendments that have followed, presage an evolution of tribes as utility market participants. Federal law and policy have consistently sought to reinforce the progress of tribes as self-governing and with sufficient capacity to address their own needs. Western's execution of other power contracts with tribes to date were intended to and have furthered tribal utility capacity increases; to now require tribes to revert to state authority in Arizona or Nevada in conjunction with allocation of Hoover hydro-electric power would be wholly inconsistent with those notions, violating overarching federal policy applicable to all federal agencies in their government to government dealings with the United State's tribal interests.

b. The Band urges Western to extend the deadline for this comment process to ensure that tribes in the Hoover service area will have sufficient time to become familiar with the allocation and submit comments supporting their interests. At present, few tribes in the Project service area are even aware of the potential to obtain Hoover power in 2017 and therefore have no knowledge of this first stage of the process to reallocate project output. Furthermore, as noted in Western's December 2009 PIF Q and A, sent on January 15, 2010, Western itself has even yet to specifically identify all tribes within the Boulder Canyon Project marketing area, despite requests for the same more than one year ago by tribal interests.

The Augustine Band of Cahuilla Indians appreciates the opportunity to submit these comments in furtherance of its desire to obtain some portion of hydro-electric power generated through the Boulder Canyon Project.

Sincerely,



Mary Ann Green
Tribal Chairperson

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